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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SKAGIT COUNTY, a Public Corporation of the State of Washington,

Plaintiff in Error,

vs.

PUGET MILL COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

The County Assessor for Skagit County, in the year 1915, assessed certain timber lands owned by the Puget Mill Company, a California corporation, in the sum of $131,745.00. Thereafter the Board of Equalization for Skagit County raised this valuation to $265,998.00. The only notice given by the

Board of Equalization for Skagit County to the Puget Mill Company of the intention of the Board of Equalization to raise the valuation placed upon these timber lands by the Assessor is contained in what is known as "Exhibit B" to the complaint.

After the tax on these lands became delinquent, the Puget Mill Company paid the same under protest, and thereafter brought suit against the County to recover the difference between the tax assessed upon the valuation fixed by the Board of Equalization and the tax which would have been assessed on the valuation as returned by the County Assessor. The case was tried before the Honorable Jeremiah Neterer sitting without a jury. The case was contested on the merits, testimony being introduced by both plaintiff and defendant. (Transcript p. 15.) The Court took time for consideration, and on May 10th filed a written opinion. (Transcript p. 16, 242 Federal 333.)

Counsel for plaintiff in error have not seen fit to bring before this Court the testimony adduced at the time of trial, but content themselves with urging that the complaint does not state a cause of action.

ARGUMENT.

Without setting out the terms of the notice directed to the Mill Company, suffice it to say that the notice in substance states that the Board of Equalization will be in session on certain named days. The notice does not state that the Mill Company if it appears before the Board on any particu-

lar day will be heard on that day, nor does it nominate any particular day for the appearance of the Mill Company before the Board.

In the case of *Everett Water Company v. Fleming,* 26 Wash. 364, the Supreme Court of the State of Washington had under consideration a notice which cannot be differentiated or distinguished from the notice given to the Puget Mill Company. The Supreme Court in that case, speaking by the late Judge Dunbar, said:

> "It is, however, *contended* by the appellants that, inasmuch as the board did not act until the 24th day of August, fully five days had elapsed between the date of the notice and the action of the board in raising the assessment. *But we think the statute contemplates a notice given to the property holder with a date certain, fixed for his appearance,* and that that certain date must be fixed more than five days from the service of the notice; *that the property owner is not compelled by the law to be in constant attendance upon the board of equalization during its entire session, but has a right to have his day in court fixed and determined by the notice.*"
> (Italics ours.)

The trial court in this case held that this construction given to the statute by the Supreme Court of the State of Washington was to be regarded as a part of the statute. This rule, as this Court knows, applies in its full force and with peculiar weight to statutes relative to taxation.

In *Lewis v. Monson,* 151 U. S. 545, 549, Mr. Justice Brewer, speaking for the Court, said:

> "No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

See also, *Paine v. Willson*, 146 Fed. 488, 489.

Counsel for plaintiff in error seek to avoid this rule, however, by now asserting that the above quoted portion of the decision in the Everett Water Company case is *obiter dictum*. But in no just sense can this ruling of the Supreme Court of Washington be called obiter dictum, or even judicial dictim. The trial court rightly held that this ruling was *the* point in the case. He said:

> "The employment of the term 'within five days' in the Everett notice was not the determining factor, and no doubt was employed through inadvertence, and if a day and time certain had been fixed for hearing the matter after five days notice, the term 'within' would not have been controlling, as it was not in the decision."

It seems to us that this position is so obviously sound that it needs no further amplification or dis-

cussion. But whether the ruling referred to was *the* point in the case or only one of the grounds for the decision, nevertheless the action of the trial court was right. The question as to whether the statute requires a notice fixing a day certain for the appearance of the property owner was before the Supreme Court and it was argued by counsel. It legitimately arose in the case. It is not the statement of a principle which served to illustrate any other point in the case, but was a ground of decision. It is formally incorporated in the syllabi to that case. And this Court is bound to presume that the question was thoroughly considered by the Supreme Court, and that the decision embodies its deliberate judgment. (*Southern Railway Co. v. North Carolina Corp. Commission,* 99 Fed. 162, 165.)

The argument of counsel then comes to this: That if a court assigns more than one reason for its action, yet, nevertheless, all the reasons assigned but one are *obiter dicta.* But how is another court to determine which of the reasons assigned by the court controlled that court's decision? Is it the first reason assigned, or the last, or perchance some one intermediate between the first and the last? Obviously, the order in which the reasons are assigned has nothing to do with the matter at all, as certain authoritative decisions hereinafter cited will abundantly show.

In *Railroad Companies v. Schutte,* 103 U. S. 118, 143, the Supreme Court said:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

In *New York Cent. & H. R. R. Co. v. Price,* 159 Fed. 330, it appears that a boy was playing upon an open lot in East Boston. The lot adjoined the railroad of the New York Central & H. R. R. Company, and was unfenced. The boy struck a plaything so that it fell on or near the track and ran after it upon the defendant's land, where he was struck by a freight train, receiving injuries from which he died. There was in force at that time in Massachusetts a statute providing for the fencing of railroads, but the Supreme Court of Massachusetts, in the case of *Byrnes v. Boston & Maine Railroad,* 181 Mass. 322, had held that an omission to fence did not render a railroad liable except as against adjoining owners. The Court said:

> "We cannot escape the force of the case of *Byrnes v. Boston & Maine Railroad,* 181 Mass. 322, 63 N. E. 897, by disregarding as dictum the expression 'the omision to fence does not render a railroad company liable except as against adjoining owners.' Assuming that the facts were such that no obligation to fence existed under the terms of the Massachusetts statute,

and that the case so held, nevertheless, as an additional reason for its decision, the court construed the statute, and held that the obligations imposed by it were solely in favor of adjoining owners. * * *

In *Smiley v. Kansas,* 196 U. S. 447, 455, 25 Sup. Ct. 289, 290, 49 L. Ed. 546, it was said:

'It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. Louis, Iron Mountain & St. Paul Railway Company v. Paul,* 173 U. S. 404, 408, 19 Sup. Ct. 419, 43 L. Ed. 746: *Missouri, Kansas & Texas Railway Company v. McCann,* 174 U. S. 580, 586, 19 Sup. Ct. 755, 43 L. Ed. 1093; *Tullis v. Lake Erie & Western Railroad Company,* 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize.'

It may be conceded that there is ground for doubt whether the construction placed upon this statute by the Massachusetts court is not narrower than its terms require. It would be a reasonable construction to say that fences are required not only for the exclusion of cattle and for the benefit of adjoining owners, but for a notice and signal of danger, and as an obstacle and preventive of harm in urban districts frequented by children. * * *

Nevertheless there is a considerable conflict of decision as to the proper construction of statutes of this kind, and there are in other states decisions supporting the views of the Massachusetts court. We find it unnecessary to review these decisions, however, since we are of the opinion that the construction of the Massachusetts statute is a local question upon which we accept the decision of the local court."

In *Chicago, B. & Q. R. Co. v. Board of Supervisors,* 182 Fed. 291, 300, it is said:

> "It is not the practice of courts to rest their decisions upon a single ground, or upon the narrowest possible basis of fact. On the contrary, every consideration which is directly controlling of the actual issue tendered is a legitimate ratio dicidendi."

As pointed out in the decision just cited, the whole doctrine is strikingly illustrated in a series of decisions relative to the use by other railroad companies of a railroad bridge crossing the Missouri River at Omaha, Nebraska, and owned by the Union Pacific Railway Company. In 1890, the Union Pacific Railway Company and its allied companies made a contract with the Rock Island Railway Company whereby, for a stipulated sum and other valuable considerations, the Rock Island Company was to be permitted to haul its trains across the Pacific Company's bridge at Omaha. Some time after the making of the contract, the Union Pacific Railway Company refused to perform its part of the contract. Thereupon, a suit was brought for specific performance. The original hearing was held before Justice Brewer sitting at circuit. The Union Pacific at that time contended that the contract was ultra vires of the Pacific Company on common law principles. In an elaborate opinion (47 Fed. 15) Justice Brewer held that the contract was not ultra vires of the Pacific Company, and in arriving at this conclusion he made no mention of any Act of Congress but based his decision on the common

law alone. On appeal (*Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309) it was held that the contract was not ultra vires of the Pacific Company for two reasons: (1) because the contract was one proper to be made under the common law right to contract; and (2) that under the Act of Congress of July 25, 1866, and of February 24, 1871, the Union Pacific Railway Company was authorized and empowered to enter into such a contract. Appeal was then taken to the United States Supreme Court (*Union Pacific Ry. Co. v. Chicago, etc. Ry. Co.*, 163 U. S. 564). That court held (1) that not only was the contract one such as was proper to be made under the general right to contract, (2) and that the Acts of Congress authorized and empowered the Pacific Railway Company to make such contract, (3) but also that the Acts of Congress in question imposed a duty on the Pacific Company to permit the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha. (163 U. S. 586.)

In 1903, the Mason City & F. D. R. Co. demanded that it be permitted to run its trains across this same bridge. The Union Pacific R. R. Company refused. Suit was brought. It was then contended that the statement by the United States Supreme Court that under the statute it was the duty of the Union Pacific to permit other railroad lines to run their trains across the bridge was *obiter dictum*. The District Court agreeing with this contention,

nevertheless held, as an original proposition, that such a duty was imposed upon the Union Pacific Railroad Company.

Mason City & F. D. R. Co. v. Union Pacific R. R. Co., 124 Fed. 409, 414.

On appeal, Judge Sanborn, speaking for the Court, apparently considered reasons (2) and (3) assigned by the Supreme Court as embracing but one proposition of law. He said:

> "It is, however, contended that it was unnecessary to the determination of the ultimate question before it for the court to decide the latter question at all; that it was unnecessary for it to determine whether or not the Pacific Company had the corporate power to make the contract under the acts relating to the Omaha Bridge, because it had already decided in the earlier part of its opinion, and before it reached the discussion and decision of this question, that the Pacific Company had this power under its general grant of authority to construct and operate railroads. It is contended that because the court based its decision of the ultimate question upon its decisions of these two questions of law, each of which was debated, discussed, and deliberately decided, and the decision of either one of which furnished ample ground to sustain the ultimate conclusion, the decision of one of these preliminary questions was unnecessary, and all that was said about it was *obiter dictum.* This argument, however, proves too much. If it establishes anything, it proves that, in every case in which a court places its adjudication of the ultimate issue of law upon its decisions of two or more legal questions, the decision of either of which is sufficient to sustain its adjudication, it decides nothing; that each of its preliminary decisions

is unnecessary because the other or the others are sufficient to sustain the adjudication without it, and hence that all of them in turn may be held to be *obiter dicta*. Such is not the law. Where the conclusion of the court may be sustained by decisions of two or more questions of law that are fairly presented for its determination, the province and duty of the court which prepares the opinion and renders the decision is to determine whether it will rest its conclusion upon one or more of these legal issues, and where it places its ultimate adjudication upon two or more propositions of law which it properly discusses and decides, either one of which is sufficient to sustain its conclusion, each decision of each of the propositions is within the limits of the case presented to it, and is a conclusive and binding adjudication of the court. The decisions of all the legal propositions upon which the court places its adjudication of the ultimate legal question are pertinent and logically lead alike to the final conclusion, and they are alike decisive of the questions which they determine. *Railroad Cos. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327; *Buchner v. Chicago, Milwaukee & N. W. Ry. Co.*, 60 Wis. 264, 270, 273, 19 N. W. 56; *Alexander v. Worthington*, 5 Md. 471, 481; *Jones v. Habersham*, 107 U. S. 174, 179, 2 Sup. Ct. 336, 27 L. Ed. 401.

Concede that the decision of the Supreme Court, that the power of the Pacific Company to make the contract with the Rock Island Company might be implied from the general grant of power to construct and operate its railroads, was ample to support its ultimate conclusion, and that it was unnecesary for it to decide that the duty was imposed upon that company, and that the power was graned to it so to do by the acts relating to the Omaha Bridge; yet it is equally true that the decision

of the latter question was also sufficient to sustain its ultimate determination, and that the former decision was equally unnecessary to that conclusion. Yet each of these two questions was debated at the bar of the Supreme Court, each of them was pertinent to the legal issue which that court was compelled to decide, each of them was discussed and decided by that court, and was one of the logical steps to the determination of the ultimate legal issue which it was required to decide, and it placed its determination of that issue upon its decision of both of these questions, and upon its decision of one as much as upon its determination of the other. That court necessarily decided, when it approved and delivered its opinion—and that decision is not open to review or criticism here—that the discussion and decision of each of these two questions was within the case before it, and essential to the determination of the ultimate issue it was considering. If it had not so decided, it would not have discussed with equal care and labor, and have decided with equal clearness and certainty, each of these issues of law. It did not disregard or discard one of these questions and place its decision upon a determination of the other, and an inferior court cannot now lawfully do so, because it cannot know upon which proposition the Supreme Court would prefer to rest its conclusion, if it were compelled to choose between them. The result is that the discussion and determination of each of these two questions must be considered within the limits of the case, pertinent and essential to the determination of the ultimate issue of law presented to the Supreme Court."

Union Pacific R. Co. v. Mason City & Ft. D. R. Co., 128 Fed. 230, 235.

Appeal was taken to the Unted States Supreme

Court and the same contention again urged. Mr. Justice Brewer, speaking for the Court, disposed of this contention in the following language:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter,* but each is the judgment of the court and of equal validity with the other. Whenever a question *fairly arises in the course of a trial,* and there is a *distinct decision of that question,* the ruling of the court in respect thereto can, in no just sense, be called mere dictum." (Italics ours.)

Union Pacific Railroad Co. v. Mason City and Ft. Dodge Railroad Co., 199 U. S. 160, 166.

See also:

United States v. Chamberlin, 219 U. S. 250, 262.
Watson v. St. Louis I. M. & S. Ry. Co., 169 Fed. 942, 945. (Affirmed 223 U. S. 745.)
Nat. Bank of Oxford v. Whitman, 76 Fed. 697, 698.
Same case on Appeal, 83 Fed. 288, 293.
Hawes v. Contra Costa Water Co., 5 Sawyer, 287, 296, et seq.
Jones v. Habersham, 107 U. S. 174, 179.
Paine v. Willson, 146 Fed. 488, 492.
Savage v. Ash, 86 Wash. 43, 46.
Milwaukee Terminal Ry. Co. v. Scott, 86 Wash. 102, 105.
State ex rel. Bailey v. Brookhart, 113 Iowa 250.
King v. Pauly, 159 Cal. 549.
Brown v. Chicago & N. W. Ry. Co., 102 Wis. 137.
O'Brien v. Union Central Life Ins. Co., 207 N. Y. 180.
Baldwin v. Anderson, 60 So. 578 (Miss.)

We think we have said enough to show that the decision of the lower court was correct, but in addition to the reasons heretofore given, other considerations constrain the same conclusion.

The decision in the case of *Everett Water Company v. Fleming* was decided in 1901. Since that time session after session of the Supreme Court has been held and no change in that construction has been made. The Legislature during that time has convened eight times. It must be presumed that the Legislature knew the construction placed upon the Act of 1899. Therefore, if the Legislature of the state thought that this decision erroneously construed the statute, it had abundant opportunity to change the law. It not only has not done so, but it has, in effect, we think, approved this construction. The statute under consideration in the Fleming case was passed in 1897. In 1907 the Legislature amended the Act of 1897 (Session Laws of 1907, p. 239) but it made absolutely no change in that portion of the law relative to the giving of notice to tax payers of an intention on the part of the Board of Equalization to raise the valuation of real or personal property. In 1915 the Legislature again amended this particular section of the tax law, but it made no change in that portion of the law relative to the giving of notice to tax payers. (Session Laws of 1915, p. 343.)

In discussing a similar situation, the Supreme Court of Washington, speaking by Mr. Justice Chadwick, said:

"The Myers case was decided in 1894. Eleven sessions of the Legislature have convened since that time. If the statute was not intended by the Legislature to bear the construction which the court put upon it, there has been ample opportunity to correct it. The Legislature has not done so. We must presume, therefore, that the construction given the statute by the court has the sanction of the lawmaking body."

State v. Hanes, 84 Wash. 601, 604.

See also:

State v. Gustafson, 87 Wash. 613, 616.
Whittlesey v. Seattle, 94 Wash. 645, 658.
German Ins. Co. v. City of Manning, 95 Fed. 597, 601.

But this is not all. Under the laws of the State of Washington, it is the duty of the Attorney General of that state to advise the various prosecuting attorneys of the state in matters relating to the duties of their office. Secions 112 and 116 of Remington & Ballinger's Code provide as follows:

"Sec. 112. The powers and duties of the attorney general, in relation to actions and proceedings in the courts, shall be * * * to consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution.."

"Sec. 116. The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the county of which he is the prosecuting attorney, in all

criminal and civil actions and proceedings in such county in which the state or such county is a party."

In pursuance of these sections of the statute, the Attorney General of the State of Washington, on September 6, 1906, rendered the following opinion to H. G. Kirkpatrick, Prosecuting Attorney for Stevens County, Washington:

"Referring to the suit recently commenced by the Newport Milling Company against Stevens County, to restrain the collection of taxes from the plaintiff, I beg leave to state that, in accordance with your verbal request, I have examined into the matter.

It is alleged in the complaint that on April 3rd, 1905, the plaintiff listed its property for assessment and taxation at the sum of $8,400.00. It is alleged that thereafter the board of equalization raised the assessment to $22,500.00. It is the plaintiff's contention that this act of the board of equalization was utterly void by reason of the insufficiency of the notice served by it upon the plaintiff.

I have had exhibited to me a notice which purports to have been received by the Newport Milling Company from the county auditor of Stevens county. The original envelope has likewise been shown to me, which bears the post-office stamp at Colville, August 9, 2 p. m., 1905, and addressed to Alex Winston, secretary Newport Milling Co., Spokane, Wash., and which the envelope shows was received at Spokane postoffice August 9, 1905.

The following is a copy of the notice:

'Office of Auditor, Stevens County,
Colville, Wash., Aug. 8, 1905.

Newport Milling Co., Newport, Wash.:

You are hereby notified that the board of

equalization intend to raise the assessed valuation of your property as follows:

Personal Property	Assessed Val.	Equalization Val.
Furniture and Safe	$ 100.00	$ 100.00
Tools, Implements and Machinery	6000.00	12000.00
Engines and Boilers	2300.00	5900.00
Dry Kiln (not on sheet)		3000.00
Saw Mill Buildings (not on sheet)		1500.00
Total		$22500.00

And unless you appear within five days from the date of this notice and show cause why such valuation should not be raised, the board will proceed to fix the value as indicated by the above figures.

F. A. Savage, County Auditor,
By L. E. Jesseph, Jr., Deputy.
Sheet No. 2449.'

Assuming that this was the only notice which was sent by Stevens county to the plaintiff, I am of the opinion that it is insufficient and that the action of the board of equalization in raising the amount is null and void.

In the case of Everett Water Company vs. Fleming, 26 Wash. 364, it was held that such notice when sent by mail is governed by section 4891 of Bal. Code, which provides that in case of the service of notice by mail the time of service shall be double that required in a case of personal service. For this reason, the notice given the plaintiff was insufficient as it requires appearance 'within five days' from the date of this notice.

The notice is defective and invalid for the further reason that no date is definitely fixed at which the plaintiff was required to appear. It was observed by our supreme court in the case which I have cited, that,

'The statute contemplates a notice given to the property holder with a date certain, fixed for his appearance, and that that certain date

> must be fixed more than five days from the service of the notice; that the property owner is not compelled by the law to be in constant attendance upon the board of equalization during its entire session, but has a right to have his day in court fixed and determined by the notice.'
>
> In the light of the decision which I have referred to, this office is of the opinion that the plaintiff is entitled to the relief which it seeks, and that, therefore, it would be futile to defend the action. I, therefore, recommend that Stevens county accept the amount of taxes properly due upon the amount or valuation of plaintiff's property, as disclosed by the assessment list filed by it."
>
> Opinions of Attorney General of Washington, 1905, 1906, page 389.

If, in view of all these considerations the ruling complained of can be called dictum of any kind, we think it must be that species of dictum described in *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co.,* 109 Fed. 393, 401, where it is said:

> "If the language of the opinion and of the syllabus on that subject is dictum, it is dictum of the highest grade, and of a grade so high that the line between it and authoritative decision is too shadowy to be discerned by average judicial acumen."

Moreover, we are of the opinion that this Court will conclude that the following statement is not wholly inapposite:

> "The terms 'obiter dicta,' 'dictum,' etc., like the phrase 'technicalities of the law,' are too often invoked by counsel to express disapprobation of some proposition of law militating against their contention."
>
> *Kiernan v. City of Portland,* 57 Ore. 454.

It is urged, however, that to give such a construction to the statute would render the statute meaningless, absurd and inoperative. Little, if anything, need be said in reply. We apprehend that Snohomish and Stevens counties, at least, have not found that a notice requiring the property owner to appear on a day certain is inoperative. If these counties had found the statute inoperative, it must be presumed that the Legislature would have been apprised of the fact and have changed the statute.

In *People v. Wilson,* 55 Mich. 506, the Supreme Court of Michigan, speaking by Judge Cooley, said:

> "It is certain that the rule as laid down in Drennan v. People, which was merely a rule of statutory construction, has been recognized and acted upon for more than twenty years, and if known evils had sprung from it we must suppose the Legislature would have taken notice of them and applied the remedy. This not having been done, we see no sufficient reason for questioning the decision ourselves."

Judgment should be affirmed.

Respectfully submitted,

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